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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JAMON RIVERA, an individual; INLAND NW AGC, a membership organization; SPOKANE HOME BUILDER'S ASSOCIATION, a, nonprofit corporation; WASHINGTON STATE ASSOCIATION OF UA PLUMBERS, PIPEFITTERS AND HVAC/R SERVICE TECHNICIANS, a labor organization; CONDRON HOMES LLC, a limited liability company; PARAS HOMES LLC, a limited liability company; GARCO CONSTRUCTION INC., a for-profit corporation, NATIONAL PROPANE GAS ASSOCIATION, a national trade association, CITIZEN ACTION DEFENSE FUND, a nonprofit corporation; AVISTA CORPORATION; CASCADE NATURAL GAS CORPORATION; and

Case No. 1:23-cv-03070-SAB

DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

July 18, 2023
10:00 a.m.
With Oral Argument

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NORTHWEST NATURAL GAS COMPANY,

Plaintiffs,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,

Defendant,

and

CLIMATE SOLUTIONS; THE LANDS COUNCIL; NW ENERGY COALITION; SIERRA CLUB; and WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY,

Defendant-Intervenors.

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TABLE OF CONTENTS

Earthjustice
810 Third Ave., Suite 610
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TABLE OF AUTHORITIES

Page(s)

Federal Cases

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104
(206) 343-7340

Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104
(206) 343-7340

Regulations

Other Authorities

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INTRODUCTION

Plaintiffs' request for emergency relief fails on every front. This rushed motion draws a bead on a moving target, barely addressing the fact that Defendant State Building Code Council ("SBCC") has already effectively given Plaintiffs the relief they seek by suspending the challenged rules and initiating a process to amend them. It leans heavily on a fractured and non-final decision of the Ninth Circuit holding a municipal prohibition on gas piping preempted by federal law, but fails to mention the pending rehearing petition that could vacate the decision. And their attempted showing of irreparable harm—consisting primarily of unsupported opinions, speculation, and hearsay—falls far short of the strict standards imposed in this Circuit for preliminary relief. Intervenors Climate Solutions *et al*., join the SBCC's opposing brief, and ask that the motion be denied.

BACKGROUND

Washington State has adopted multiple ambitious policies that seek to drastically reduce greenhouse gas emissions and catalyze a transition to clean energy. Hall Decl. ¶ 6-9. One of these policies, the state's Energy Code, RCW 19.27A, addresses greenhouse gas emissions from residential and commercial buildings—one of the primary sources of greenhouse gases in Washington State. *Id*. ¶ 9. Under this statute, the SBCC is charged with implementing increasingly stringent building design standards to reach zero

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emissions from fossil fuels by 2031. RCW 19.27A.020(2)(a). The SBCC has been implementing this regime since around 1990 with statewide energy standards for residential and commercial buildings that are updated every three years.

The SBCC adopted the most recent iteration of these rules in two phases in 2022 and early 2023, with an effective date of July 1, 2023. The rules were adopted after an extensive public process including many technical meetings, public hearings, and opportunities for comment. They comprise hundreds of pages of detailed technical standards, most of which are not at issue here. Recently, the SBCC filed an amended rule-making order (known as a CR-103P) pushing back the effective date of the rules until October 29, 2023, and initiated a rulemaking process to amend the rules before then. That process is now well underway.

ARGUMENT

"A preliminary injunction is an extraordinary remedy" that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) (emphasis in original). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

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absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Here, Plaintiffs cannot prevail on *any* factor, let alone all of them.

I. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS

Plaintiffs raise a single claim: that portions of the SBCC building codes are federally preempted by the Energy Policy Conservation Act ("EPCA"). In *California Restaurant Association v. Berkeley* ("*CRA*"), a divided panel of the Ninth Circuit held that EPCA preempted Berkeley's prohibition on some fossil fuel infrastructure in new buildings. 65 F.4th 1045, 1056 (9th Cir. 2023). EPCA sets national standards for the efficiency of certain appliances like furnaces and stoves. To prevent manufacturers contending with a patchwork of varying state standards, Congress preempted state and local governments from setting their own appliance efficiency standards. *See* 42 U.S.C. § 6297(c). Building codes that meet certain criteria are exempt from EPCA's preemption provision in cases where it would otherwise apply. *Id.* § 6297(f)(3); *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1145 (9th Cir. 2012) (upholding SBCC building standards). In *CRA*, the panel found that Berkeley's gas piping prohibition was preempted by EPCA because it impacted the "energy use" of covered appliances. 65 F.4th at 1050-51. Plaintiffs' case relies almost entirely on *CRA*.

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The *CRA* litigation is far from over. Berkeley has filed a petition for rehearing *en banc*, which is pending. Hasselman Decl., Ex. 1. The petition was supported by the United States, which observed that "[r]ehearing is warranted to correct the panel's error regarding [] issues of exceptional importance," along with multiple other amici—including the State of Washington. *Id*., Ex. 2, at 2. A decision from the Ninth Circuit to grant rehearing would prevent this Court from relying on the decision until the rehearing is resolved. Fed. R. App. Proc. 35.

Regardless, Plaintiffs are unlikely to prevail on the merits because the SBCC has already initiated a process to amend the rules in light of *CRA*, making this case unripe. Plaintiffs can challenge the revised rules once finalized if they feel that they are preempted by EPCA. Until the process is complete, their challenge is premature. *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981) (noting a "challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied").

II. PLAINTIFFS FAIL TO SHOW LIKELY IRREPARABLE HARM

Irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2023). The irreparable harm factor requires a party "seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22

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(emphasis in original). A "[m]ere possibility of harm" is insufficient to invoke a court's emergency powers. *Enyart v. Nat'l Conf. of Bar Exam'rs*, 630 F.3d 1153, 1165 (9th Cir. 2011). The alleged injury must also be imminent: "a plaintiff must demonstrate immediate threatened injury" to obtain preliminary injunctive relief. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

Plaintiffs' motion does not come close to passing this demanding standard. Most obviously, irreparable injury is not "likely," because the SBCC has initiated a process to amend the rules, and delayed implementation until that process is complete. That fact alone dooms this motion. Where a defendant initiates a process to amend a challenged action, the appropriate posture is to stay the proceeding until the amendment is complete—not issue an injunction. *See, e.g.*, *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1324 (D. Idaho 2019) (litigation "put on hold" while the administration amended challenged plans). Plaintiffs may argue that the SBCC could abandon the rulemaking, leaving the current rules in place, but this implausible outcome is hardly "likely" enough to warrant an injunction now. For the same reasons, the claimed harm is not "imminent." *Baldrige*, 844 F.2d at 674. And as the SBCC explains in its brief, Plaintiffs' belief that the agency cannot delay the effective date, or timely amend its rules, is flat wrong.

Plaintiffs claim that harm is occurring already from rules that were never implemented. Motion at 12-14. They fail to offer even a single case applying this

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novel theory of harm, nor can one be found. Moreover, plaintiffs bear the burden of proof through competent evidence. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (plaintiff must make "a clear showing"). Measured by this standard, Plaintiffs' showing of imminent irreparable injury collapses.

Plaintiffs' witnesses complain that the rules—which were only recently enacted, were never implemented, and have been stayed—have already caused them hardship, but make no effort to explain how or why. For example, one declarant complains that people in the propane business are already experiencing a "dramatic and substantial decline in business." Kaminski Decl. ¶ 4. But Mr. Kaminski offers no insights into how never-implemented regulations could have caused this alleged decline. *See also* WAC 51-11C-40314 (allowing use of propane in some instances). Another offers only a bare conclusion that the rules are having a "direct negative impact" on union members, but no discussion as to how or why. Hartman Decl. ¶ 5. These are precisely the sort of "unsupported and conclusory statements regarding harm" that a plaintiff "might suffer" that must be rejected. *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *Wyoming v. Dep't of Interior*, 2017 WL 161428, at *11 (D. Wyo. Jan. 16,

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2017) (allegations of harm from rules that would not be effective for a year was "simply too uncertain and speculative" to warrant injunctive relief).[1]

Similarly, witnesses from the gas utilities predict declining customer counts caused by the rules. Frankel Decl. ¶ 7; Forsyth Decl. ¶ 5; Robertson Decl. ¶ 6. Plaintiffs make no effort to qualify these witnesses as experts, reveal the data that they rely on, or explain the methodology that they use. These predictions are not facts—they are opinions. Unsupported, vague, and conclusory opinions cannot substitute for qualified affiants and competent evidence. *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010) ("speculation cannot substitute for evidence" of irreparable harm); *Baldrige*, 844 F.2d at 674 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.").

Not a single witness makes any effort to differentiate the impacts of the SBCC's rules from the countless other forces that are impacting the fossil fuel business. Washington State is and has been deeply committed to an energy transition away from fossil fuels. This is playing out in countless forums: city ordinances that incentivize building electrification; utility commissions

[1] Plaintiffs' declarations are also riddled with inadmissible hearsay. *See, e.g.*, Koschalk Decl. ¶ 6 ("We have already heard from people who don't understand how" the rules work); Stewart Decl. ¶ 7 ("Some of our members tell us . . .").

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investigating the decarbonization of the gas system; and changing consumer choices in light of emerging evidence that burning fossil gas in buildings carries serious health risks. Hall Decl. ¶ 12-16. All are playing a role in a shift away from fossil gas. Gas purveyors may be feeling an impact from this transition, but that does not mean such impacts are caused by the challenged rules.

To be sure, Intervenors care deeply that SBCC's building energy rules work for unions, builders, and homeowners. Hall Decl. ¶ 22. They understand that adverse economic impacts could weaken support for the rules, and have consistently advocated that such concerns be addressed in crafting them. Indeed, the economic impacts of shifting away from fossil fuels like gas were a particular focus of the rule process and received careful attention from the SBCC. *Id*. ¶ 23. The data in that process demonstrated that the rules would be both an environmental and economic win for the state. *Id*. Plaintiffs can raise their perspective about economic impacts anew during the rulemaking process for the revised rules, just as they did during previous processes.

In sum, Plaintiffs have fallen far short of satisfying their burden of showing imminent irreparable harm.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST DO NOT SUPPORT AN INJUNCTION.

Given the deficiencies in Plaintiffs' showing of irreparable harm, there is no need for this Court to reach the other injunction factors. Even so, these factors also

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tip sharply against the requested relief. "[D]istrict courts must give serious consideration to the balance of equities." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). A state "suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Where an injunction would reach beyond the parties and impact the public, a Court must also carefully weigh the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-40 (9th Cir. 2009) (overturning injunction against Washington state regulations as contrary to public interest).

An injunction against the rules would cause harm to Intervenors. Enjoining rules that already are in the process of amendment would sow "public confusion" and have a chilling effect on other jurisdictions considering clean energy policies. Hall Decl. ¶ 20-21. It could empower those who seek to use disinformation to fight against clean energy policies. *Id*. It could also undermine the ongoing good-faith effort of SBCC to address EPCA concerns via rulemaking amendment. Indeed, because EPCA specifically exempts building codes that meet certain criteria from preemption, 42 U.S.C. § 6297(f)(3), modest amendments to just one of the compliance pathways might resolve Plaintiffs' EPCA concerns, while leaving the vast majority of the rules intact. Courts have rejected injunction requests in comparable situations. *See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of*

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Reclamation, 2016 WL 9226390, at *5 (D. Or. 2016) (injunction "would disrupt the ongoing, collaborative efforts" to resolve problem).

As to the public interest, it is most clearly represented by Washington's unchallenged commitment to addressing the climate crisis by eliminating greenhouse gas emissions and transitioning to clean energy. "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker,* 348 U.S. 26, 32 (1954); *see also Dep't of Ecology v. State Fin. Comm*., 804 P.2d 1241, 1247 (Wash. 1991) ("[L]egislative declaration is presumed to express the will of the people."). As the legislature has found, "excessive dependence on fossil fuels jeopardizes Washington's economic security, environmental integrity, and public health." RCW 43.325.005(1). That's why it enacted a statutory goal to phase out greenhouse gas emissions from fossil fuel use in commercial and residential buildings by 2031. RCW 19.27A.020(2)(a). Plaintiffs invite this Court to implement an end-run around policies which represent the public interest. Intervenors ask this Court to reject the invitation.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

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DATED: June 22, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby declare that on this day, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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